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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et. al.*,

Petitioners,

—v.—

BRIDGET C. MERGENS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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Questions Presented

I. Whether the Equal Access Act and its application in the present case requiring Westside High School to recognize and sponsor a Christian prayer club violates the establishment clause of the first amendment.

II. Whether the Equal Access Act's mandate requiring public secondary schools to recognize and sponsor religious student speech as it would other speech is compelled by the free speech clause of the first amendment.

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their joint letter of consent has been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state.

In support of this principle, the League has previously filed briefs in this Court as counsel and as a friend of the court in numerous cases dealing with the religious liberty clauses of the first amendment. *E.g., Allegheny County* v. *A.C.L.U.*, 109 S. Ct. 3086 (1989); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with 275,000 members dedicated to preserving the principles embodied in the Bill of Rights, including the separation of church and state. The ACLU has frequently appeared before this Court on church-state issues, both as direct counsel and as *amicus curiae*.

The National Coalition for Public Education and Religious Liberty is a coalition of individuals and organizations dedicated to a strong public school system which guarantees the religious liberty of all citizens. In support of these principles, the National Coalition for Public Education and Religious Liberty has intervened in many key establishment clause cases. *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Aguilar* v.

Felton, 473 U.S. 402, 412 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); and *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). Members organizations of the National Coalition for Public Education and Religious Liberty participating in this brief are listed at appendix B.

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national organizations: B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America/National Women's League for Conservative Judaism, Women's American ORT as well as 117 community member agencies representing all major Jewish communities in the United States, listed in appendix A. As the national planning and coordinating body for the field of Jewish community relations, the NJCRAC believes that the separation of church and state in the public schools is an essential bulwark in maintaining the individual and political equality of all Americans.

This brief is also submitted on behalf of the Committee for Public Education and Religious Liberty (PEARL), a non-profit corporation consisting of organizational and individual members committed to the preservation of the dual principles of the separation of church and state and the free exercise of religion as they relate to education in the State of New York. To effectuate this purpose, PEARL has instituted suits and submitted briefs *amicus curiae* in numerous actions arising under the establishment clause, including *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); and *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

Americans for Religious Liberty (ARL) is a non-profit, nationwide educational organization whose members represent the entire religious spectrum. ARL maintains that strict religious neutrality is required of our public schools by the first amendment. In support of this principle, ARL has filed briefs *amicus curiae* in numerous establishment clause cases. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987).

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In enacting the Equal Access Act ("EAA") Congress expressly rejected this Court's interpretations of both the free speech and the establishment clauses of the first amendment. This Court has long held that the establishment clause prohibits school-sponsored religious activities in the public schools. In addition, this Court has recognized that the free speech clause permits limitations on those forms of student expression which implicate the voice of government. The EAA rejects these fundamental principles of first amendment jurisprudence.

The EAA seeks to equate school-sponsored prayer meetings with nonreligious school-sponsored activities. This legislative equation overlooks the establishment clause barrier against the use of the public schools to promote religion. The EAA permits, even requires, government to lend both material and symbolic support to religion, in blatant disregard for this Court's longstanding teachings under the establishment clause. An examination of the text and history of the EAA and its application to the prayer club involved in this case demonstrates that the EAA violates core establishment clause principles by providing government support to religion.

The EAA purports to extend the protection of the free speech clause to school sanctioned religious activities. Under the free speech clause, students in this case and in public schools across the country are free to meet to discuss religious issues and to pray. But the free speech clause does not require the public schools to place their imprimatur upon student religious meetings. By requiring our nation's public schools to endorse sectarian activities, the EAA, rather than fostering religious freedom, threatens individual rights of conscience.

ARGUMENT

I. The Equal Access Act Violates the Establishment Clause of the First Amendment.

A. Public Schools and the Establishment Clause: The *Lemon* Test

The establishment clause of the first amendment mandates that "Congress shall make no law respecting an establishment of religion." In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), this Court developed a now longstanding tripartite analysis to determine the constitutionality of government involvement with religion under the establishment clause: the challenged practice must have a secular purpose, its effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion.[1] A government action violates the establishment clause if it fails any one of the three prongs. *Edwards* v. *Aguillard*, 482 U.S. 578 (1987).

The *Lemon* analysis was first articulated in a case involving government support for religion in education; and this Court has "relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Edwards*, 482 U.S. 578; *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

B. The Equal Access Act On Its Face and as Applied in This Case Violates All Three Prongs of the *Lemon* Test

1. The Purpose of the EAA and of the Christian Bible Club Meetings at Westside High School is Religious

a. The EAA's Religious Purpose

When examining the constitutionality of a statute under the purpose prong of the *Lemon* test, this Court examines the legislation's "preeminent purpose." *Edwards*, 482 U.S. at

[1]This Court recently reaffirmed the continuing vitality of the *Lemon* test in *Allegheny* v. *ACLU*, 109 S. Ct. 3086 (1989).

590. In evaluating a statute requiring a religious display in the public schools, the Court concluded "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose and is therefore unconstitutional." *Stone* v. *Graham*, 449 U.S. 39 (1980). Similarly, this Court struck down a legislative attempt to introduce prayer in the public schools, holding that the statutory provision for a moment of silence was enacted for "the sole purpose of expressing the State's endorsement of prayer. . . ." *Wallace*, 472 U.S. at 60. More recently, Louisiana's "Balanced Treatment Act" did not survive constitutional scrutiny because it lacked a secular purpose. Although the state legislature had articulated a secular purpose, Justice Brennan, writing for the Court, explained, "it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 587.

As Justice O'Connor explained in her concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 688 (1984) "[t]he purpose prong of the *Lemon* test asks whether government's *actual* purpose is to endorse or disapprove of religion." 465 U.S. at 690, (emphasis added). To determine a statute's actual purpose, this Court has focused on the statute's legislative history. *See, e.g., Wallace*, 472 U.S. at 60. An examination of the language and the legislative history of the EAA demonstrates beyond any doubt that, notwithstanding its asserted goal of allowing all students "equal access" to school facilities, the actual purpose of the EAA is to promote sectarian religious activities in the public schools.

i. The Origins of the EAA

The EAA was the result of a two year effort, through a variety of legislative proposals and constitutional amendments, to circumvent this Court's school prayer decisions, *see, e.g., Engel* v. *Vitale*, 370 U.S. 421 (1962), and to promote religious activities in the public schools. The original equal access proposal was introduced in 1982. S.2928 specifically authorized meetings at the public schools for student religious groups. S.2928, 97th Cong., 2d Sess., 128 Cong. Rec. 11,719 (1982). This proposal gave way to two proposed constitutional amendments, the Hatch and Dixon Amendments, which also

sought to introduce prayer into the public schools.[2] When these efforts failed, they gave birth to several legislative initiatives. One of the bills, entitled the "Equal Access Act" provided that it would be unlawful for a school receiving federal financial assistance to deny "equal access . . . [to] students . . . that seek to engage in . . . activities that include prayer or religious speech on school premises. S.1059, S. Rep. No. 357, 98th Cong., 2d Sess. 1 *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348. The Religious Speech Protection Act, the immediate precursor to the EAA, also expressly provided for student prayer meetings in the public schools.[3]

The religious purpose of the EAA manifested itself in the floor debates. In struggling to defend the EAA's deficiencies, Senator Hatfield, one of its leading proponents, essentially conceded that the "equal access" concept was an artifice to escape the establishment clause barrier to the use of the public schools to promote religion: "The Senator from Alabama has spoken about religious activities . . . I believe you can . . . present this case as . . . a matter of freedom of speech and freedom of assembly." *See* 130 Cong. Rec. S.8337 (daily ed. June 27, 1984). Thus the "equal access" concept was extended to protect "political, philosophical, or other" types of speech as a compromise measure to placate those members of Congress who "feared that protecting any religious speech would run afoul of the Establishment Clause." *Student Coalition for*

[2]S.J. Res. 212, 98th Cong., 1st. Sess. §2, 130 Cong.Rec. 93 (daily ed. Jan. 24, 1984); S. 2782, 98th Cong., 1st Sess., §§1-2, 130 Cong. Rec. 2678 (daily ed. Mar 4, 1984). In his statement before the Senate Committee on the Judiciary, Senator Denton explained that equal access measures were designed "to restore the constitutional right to pray in public schools and buildings." Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).

[3]The Religious Speech Protection Act provided in part:

> It shall be a policy subject to the penalties in section 2 for a public secondary school receiving federal financial assistance which generally allows non-school sponsored groups of students to meet, not to discriminate on the basis of the religious content of the speech at such meetings.

H.R.4996, *cited as* revised S. 815, 98th Cong., 2d Sess., 130 Cong. Rec. 2433 (daily ed. Mar. 8, 1984).

Peace v. Lower Merion School, 776 F.2d 431, 439 (1985), *discussing* 130 Cong.Rec.8336-37 (remarks of Sen. Hatfield).

Senator Mattingly was even more direct: "The purpose of [the EAA] is, simply and straightforward [sic]—to allow students in public schools throughout this Nation to meet voluntarily during noninstructional periods for religious discussion, or Bible study, or prayer." *Id.* at 8360.[4] He did not conceal the EAA constituted a legislative maneuver to promote school prayer:

> Earlier this year the Senate debated for several weeks President Reagan's constitutional prayer amendment. Much to my regret, and I am sure to many of my colleagues in the Senate, President Reagan's amendment failed to receive the necessary two-thirds majority vote for passage.
>
> Following the vote I expressed my disappointment in the outcome of the prayer amendment. However, I also expressed my desire for the Senate to take the next step toward restoring . . . religion in the schools—which is to ensure that students are provided equal access to school facilities for voluntary religious activities.

Id. at 8361.[5]

To believe the EAA was actually intended to enhance student free speech rights, one would have to overlook the extensive history reflecting Congressional efforts to promote religion in the public schools. As reflected in this legislative history, the EAA "was not motivated by any clearly secular purpose." *Wallace*, 472 U.S. at 56. "[W]e need not be blind in this case to the legislature's preeminent religious purpose in

[4]The general perception of the religious purpose of the EAA is also captured in the media's reference to it as "the Son of School Prayer." *President Signs a Bill To Permit Prayer in Schools*, New York Times, Aug. 1, 1984, at A24, col. 1.

[5]For added analysis of the religious purpose of the EAA as reflected in its legislative history, see Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools*, 12 Hastings Const. L.Q. 529 (1985).

enacting this statute." *Edwards*, 482 U.S. at 590. The legislative history of the EAA reveals the statute lacks the constitutionally required secular purpose.

ii. The Language of the EAA

Although the EAA is ostensibly intended as a measure to protect all student speech equally, its very text reveals its impermissible religious purpose. The Act purports to protect the right of students to meet for discussions on all philosophical, political and religious subjects. Significantly, however, the majority of the EAA's provisions are devoted to circumventing the constitutional barriers to government sponsored religious activities in the public schools. In seeking to protect religious meetings, the EAA has the paradoxical effect of limiting, rather than enhancing, all other nonreligious student activities in the public schools.

For example, the EAA specifies that student meetings cannot be sponsored by the school, government, or its agents or employees. 20 U.S.C. §4071(c)(5). This statutory provision is irrelevant to a meeting of typical youth organizations such as the noncurricular clubs stipulated to this case.[6] No social, educational or constitutional propose is served by preventing the public schools from sponsoring, and even encouraging, student attendance at such meetings. To the contrary, the value of such clubs is only diminished by depriving them of school sponsorship.

The EAA goes on to require that for the purpose of creating a limited open forum, "nonschool persons may not direct, conduct, control or regularly attend the meetings." 20 U.S.C. §4071(c)(5). Once again, this provision is irrelevant, even counterproductive, to all student clubs other than sectarian religious groups. A 4-H club does not need the protection of the EAA to meet at school, but under the EAA, it could be prohibited from inviting a local farmer to lead a discussion on agricultural subjects. While purporting to protect students' rights of free expression, the EAA ironically limits the availability of information and means of expression in the schools by extending the constitutional prohibition against school support for religion to all student clubs.

[6]The noncurricular clubs at Westside include: the ski club, a chess club, a surfing club, and service clubs, such as Welcome to Westside, Zonta and Interact. J.A. 297-307.

The provisions of the EAA which specifically address religious activities conclusively demonstrate that its actual purpose is to promote religion, and not to broaden free expression in the public schools. Sections 4071(d)(1), (2) and (3) prohibit school officials from influencing the form of religious activity, requiring any person to participate in religious activity and expending public funds on student meetings. These provisions are material only to those student meetings which are religious and likely to conflict with this Court's longstanding decisions prohibiting the use of the public schools to promote religion. *See, e.g., Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

School sponsored student meetings which are not religious in nature do not need the protection of the EAA. Further, individual religious student expression does not need the protection of the EAA. *See Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). Accordingly, it is specious to argue that the EAA's purpose is to protect student rights of free expression. The EAA's exclusive purpose is to protect school sponsored religious meetings.

By enacting the EAA, Congress provided statutory support to those religious faiths seeking governmental support for their worship and proselytizing efforts. The true purpose of the EAA is to eviscerate the constitutional mandate forbidding the use of the public schools to promote religion. "[W]hen the state enacts a law to serve a religious purpose. . . [its] governmental intention to promote religion is clear." *Edwards*, 482 U.S. at 585.

b. The Religious Purpose of the Student Meetings at Westside High School

Though respondents strain to characterize the Christian club as a component of the secular educational goals of Westside High School ("Westside"), the record clearly demonstrates that the club is devoted to essential Christian purposes.

Bridget Mergens conceded below that she organized the Bible club not only to engage in the quintessentially religious activities of prayer and fellowship, but also because she wanted to promote Christianity to non-religious students at Westside. J.A. 75. Prayer and proselytizing are religious activities. *See Engel* v. *Vitale*, 370 U.S. at 424; *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

Proselytizing is an important part of the Christian Bible club's activities. One club member explained that he attended the Bible club meetings not only because it allowed him to use Westside to further his development as a Christian, but because the club also enabled him to assist others to "become Christians." J.A. 185. Another club member similarly testified that the club fit in with her involvement in a program called "Evangelism Explosion," which is devoted to telling others about "Jesus Christ and how he has affected our life." Trial Transcript at 232. A Christian Bible club organized to engage in prayer and to attract converts serves an exclusively religious purpose.

2. The EAA Has the Primary Effect of Promoting Religion

a. Use of School Resources

Though this Court has not yet considered the constitutionality of school sponsored student worship in the public schools, similar religious practices have not withstood constitutional scrutiny. In *McCollum*, the Court held the establishment clause prohibits religious groups from taking advantage of the state's public school machinery to further their sectarian goals:

> The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. . . . This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment.

333 U.S. at 209-210. The establishment clause bars the state from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society

than it would have by relying on its members alone." *Abington*, 374 U.S. at 229.

Westside conducts a club fair in its gym each year under the direction of the assistant principal at which clubs aggressively recruit new members. J.A. 422 *et. seq.* Requiring the school to allow respondents to exploit a school-sponsored fair conducted in the school's gymnasium to win converts clearly involves the "utilization of the tax-established and tax supported public school system to aid religious groups." *McCollum*, 333 U.S. at 210.

Though the EAA seeks to justify organized religious activities by characterizing prayer meetings and proselytizing as "student-initiated," the establishment clause proscription on the use of public school resources to promote religion in no way depends upon who initiates the religious activities. Under the establishment clause, it is immaterial whether students, teachers, or outsiders initiate the religious activities. *See* 12 Hast. Const. L. Q. 529, *supra* note 5. The religious activities held unconstitutional in *McCollum* originated with private individuals, not state officials, but the Court recognized that the exploitation of state resources for religious purposes and the accompanying appearance of government support for religion violated the establishment clause.

b. The Imprimatur of Government

The EAA not only sanctions the use of public school resources to advance religion, it also violates the establishment clause by requiring the public schools to place their imprimatur on religious activities. The EAA permits the students at Westside and at public secondary schools across the country to obtain their school's official sponsorship and recognition of sectarian clubs devoted to worship and proselytizing. 20 U.S.C. §4071(b). Conducting religious activities under the school's formal auspices and with school approval creates the impression that government endorses those sectarian practices or beliefs.

More than forty years ago, the Court recognized that the public school constitutes "the symbol of our democracy." *McCollum*, 333 U.S. at 231. In *Engel*, Justice Black wrote that activities which place the government's "official stamp of

approval" on religion represent "one of the greatest dangers to the freedom of the individual to worship in his own way." 370 U.S. at 429.

More recently, this Court explained in *Grand Rapids*:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

473 U.S. at 389. In *Grand Rapids*, the Court concluded the challenged programs violated the establishment clause in several ways. Not only did they provide a government subsidy to religion, permitting state-funded religious indoctrination, but they also created the unconstitutional appearance of a "symbolic union of church and state." *Id.* at 397. The EAA provides for a similar union of church and state. When a public high school provides official sponsorship to sectarian activities, government becomes unconstitutionally allied with religion. *See Abington*, 374 U.S. at 224; *see also Larkin* v. *Grendel's Den*, 459 U.S. 116, 125-126 (1982).

Every federal appellate court to review the constitutionality of "equal access" religious activities in the public schools, with the sole exception of the court below, has held that such activities violate the establishment clause by placing the government's imprimatur on religion. *Garnett* v. *Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989); *Bender* v. *Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Bell* v. *Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Nartowicz* v. *Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union* v. *Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1159 (1983); *Brandon* v. *Bd. of Ed.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

In *Bender*, the Court of Appeals for the Third Circuit explained:

> Since it is the public schools which provide the most prolonged and involved contact which youth enjoy with the state, and indeed, for many, the public schools may appear as an institutional symbol of government in general, any practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation.

741 F.2d at 555. Most recently, the Ninth Circuit, addressing a nearly identical factual setting, held the use of high school facilities to conduct student prayer meetings impermissibly advances religion because the meetings are school recognized and thus enjoy school sponsorship. The circuit recognized the many distinctions between the setting of a public secondary school and the university setting presented in *Widmar* v. *Vincent*, 454 U.S. 269 (1981):

> Unlike university students, high school students are required to attend school. The instructional format at a high school is far more structured than at a university. . . . Teachers at high school, unlike college professors, are both educators and authority figures. The same considerations that mandate special vigilance in preventing religious establishments in public schools—the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities. The religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus.

865 F.2d at 1125-1126. *See Lubbock*, 669 F.2d at 1045. ([A]llowing religious meetings at a time closely associated with the beginning or the end of the school day . . . carries with it the implicit approval by school officials. . . . This renders the primary effect of the policy impermissible advancement of religion).

To our nation's students, the public school is a symbol of government. *McCollum*, 333 U.S. at 231. This Court and the overwhelming majority of federal appellate courts have held that permitting organized religious activities in the public schools violates the establishment clause by conferring the government's imprimatur upon those sectarian activities. By requiring a school to recognize a school religious club when the school provides for even a single "non-curricular" club, 20 U.S.C. §4071(a), the EAA only exacerbates the impression of state sponsorship of religion. In a school at which there is only one other student club, and the school's sanction, therefore, is not diffused through a variety of student organizations, the EAA-required school promotion of a religious club underscores the appearance of unconstitutional government sponsorship of religion.

c. The Effect of School-Endorsed Prayer on Students

By requiring the public schools to endorse religious clubs, the EAA threatens the religious liberty of all those students who are not members of the endorsed religion. Justice O'Connor has articulated the rationale underlying the first amendment's mandate against government endorsement of religion:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.

Wallace, 472 U.S. at 70. In her concurring opinion in *Lynch*, Justice O'Connor wrote:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

465 U.S. at 669.

This Court recently reaffirmed the significance of this test in *Allegheny* v. *A.C.L.U.*, 109 S. Ct. 3086. Writing for the Court, Justice Blackmun defined the establishment clause inquiry in part as whether nonadherents are likely to perceive the challenged governmental action as a disapproval of their individual religious choices. *Id.* at 3101-3103. In his dissent, Justice Kennedy agreed the establishment clause proscribes an activity which "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 3137.

When a public school endorses a sectarian student group, students will be influenced to adopt the school endorsed prayer club's beliefs to meet what they perceive to be the school's expectations. As the Court of Appeals for the Second Circuit observed in *Brandon*:

> An adolescent may perceive "voluntary" school prayer in a different light were he to see the captain of the schools football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a public school.

635 F.2d at 978. Justice Frankfurter expressed the same view in *McCollum*, "[t]he law of imitation operates, and nonconformity is not an outstanding characteristic of children." 333 U.S. at 227. The EAA only increases this pressure to conform by requiring schools to place their authority behind student religious clubs.

In enacting the EAA, Congress did more than pass unconstitutional legislation designed specifically to advance the religious needs of certain sectarian groups. *See Larson* v. *Valente*, 456 U.S. 228 (1982). The EAA also threatens the religious liberty of nonadherent students. In the public school context, students who choose not to participate in school sanctioned religious meetings become outsiders in their own community. These serious social consequences are especially problematic since secondary school students are compelled by law to attend school. The establishment clause prohibits the

government from diminishing anyone's stature in the community on the basis of their religious choices. *Allegheny*, 109 S. Ct. at 3102.

d. The Effect of the Christian Club at Westside: School Sanctioned Prayer

Though respondents freely engage in informal religious meetings at Westside, in the present action they expressly seek the school's formal endorsement of their sectarian activities through the school's official recognition and sponsorship of their club. J.A. 141, 428. Requiring official school sponsorship of the Christian Bible club would give rise to a blatant form of state sponsorship of religion.

Westside students testified they pray informally as a group and discuss religious matters without interference from school officials. J.A. 106, 136.[7] Dr. Findley, Westside's Principal, told the students they could meet informally at school for religious purposes. J.A. 428. Unsatisfied with such meetings, however, respondents now demand that the school place its formal sanction on their sectarian activities. J.A. 141, 428.

Under Westside's policy, every student club is officially sponsored by the school. J.A. 488. School Board Policy 5610, which governs Westside, provides, in pertinent part:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> *School-sponsored clubs and organizations are those directly under the control of the school administration, and shall have faculty sponsorship.* The Superintendent shall establish guidelines for clubs and organizations which shall function for the welfare and best interest of the students and the school.

[7]In addition, they meet for fellowship and prayer in each other's homes and at church. J.A. 140.

> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race color, creed, sex or political belief.

Id. (emphasis added).

Dr. Findley testified that under this policy, the Christian club would involve school sponsorship. He explained: "We've always had a sponsor in charge of a club and . . . we've always encouraged kids' participation in clubs and activities. In fact . . . when I talk to parents I emphasize the importance of being involved." J.A. 425. A sectarian club at Westside would necessarily receive the official support of the school administration.

Respondents do not seek the right to engage in prayer; instead, they seek the school's endorsement of their sectarian activities. Nothing prevents the students at Westside from meeting on school premises or outside of school to pray. What the establishment clause forbids is the formal governmental sanction of these religious meetings. The first amendment "has never meant that a majority could use the machinery of the state to practice its beliefs." *Engel*, 374 U.S. at 226.

3. The EAA and its Application in this Case Fosters Unconstitutional Entanglement of Government and Religion

a. The EAA

When religious activities take place within the highly supervised context of a public school, the school inevitably becomes entangled with religion. In *Lemon*, the Court recognized the entanglement which flows from "putting the school in a position of governance over religious activity." 403 U.S. at 621-622. *Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985).

The EAA provides for the "nonparticipatory" presence of public employees at student meetings. 20 U.S.C. §4071 (c)(3). The lower courts have consistently recognized that faculty supervision of student religious activities creates a

level of administrative entanglement with religion which renders school-supervised student worship unconstitutional. In *Garnett*, the Ninth Circuit said "the necessary supervision of student activities by teachers" makes it likely that government and religion will become excessively entangled. 865 F.2d at 1126. The Second Circuit has similarly concluded, "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined." *Brandon*, 635 F.2d at 979. *See also Bender*, 741 F.2d at 556-557; *Lubbock*, 669 F.2d at 1047; *Collins* v. *Chandler*, 644 F.2d 759 (9th Cir. 1981); *Trietley* v. *Board of Ed.*, 65 A.2d 1, 409 N.Y.S. 912 (1978).

Under the EAA, there is added unconstitutional entanglement because the schools must monitor student religious meetings to ensure they remain "student-initiated." 20 U.S.C. §4071(c)(1). Excessive entanglement inheres in the constant surveillance needed to guarantee that student participation in prayer meetings remains free of coercion. *Lubbock*, 669 F.2d at 1047.

b. The Application of the EAA in the Present Case Would Result In Excessive Entanglement Between Government and Religion

Pursuant to Westside's policy and practice, its student clubs are an integral part of the school's program. Policy 5610 requires that every student club have a faculty sponsor. J.A. 188. Such faculty supervision engenders entanglement between the school and religion. "[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Lemon*, 403 U.S. at 620-621.

The fundraising activities of student clubs at Westside present added entanglement concerns. J.A. 353, 357. School officials would have to engage in pervasive monitoring to ensure that the funds raised by the Christian club representing the school in the outside community are not employed for sectarian purposes. Such close government supervision of the daily activities of a religious organization "infringes precisely

those establishment clause values at the root of the prohibition of excessive entanglements." *Aguilar*, 473 U.S. at 412.

The constitutional prohibition against entanglements between government and religion arises from the historical concern over social divisiveness along religious lines. *Lemon*, 430 U.S. at 624.[8] The public schools symbolize our democracy, and "[i]n no activity of the state is it more vital to keep out divisive forces than in the schools." *McCollum*, 333 U.S. at 231. Justice Brennan expressed this concern eloquently in his concurring opinion in *Abington*:

> [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. . . .

374 U.S. at 241-242. School sponsorship of sectarian activities under the EAA fosters social divisiveness and undermines the welfare of our country's unparalled religious diversity.

III. *Widmar* v. *Vincent* Does Not Apply to Public Secondary Schools.

Widmar v. *Vincent*, 454 U.S. 263 (1981), held that the establishment clause did not prevent a religious group from meeting at the University of Missouri. The Court found that by making its facilities "generally available" to more than 100 student groups, the university had created a public forum.

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[8]While the Court appears to have limited its concern over the constitutional significance of societal divisiveness along religious lines to the context of cases involving direct financial aid to religion, *see Lynch*, 465 U.S. at 685, such parameters have not been articulated in the context of the public schools, which present unique divisiveness concerns. *See Abington*, 374 U.S. at 242; *McCollum*, 333 U.S. at 227 (Brennan J., concurring).

Absent a compelling state interest, the exclusion of a speaker from such a forum would violate the Constitution. 454 U.S. at 270.

The EAA seeks to apply *Widmar* to the context of public secondary schools.[9] In the present case, the court below simply accepted Congress' extension of *Widmar*. 867 F.2d at 1080. By extending *Widmar* beyond its facts, however, the EAA ignores essential constitutional distinctions between a public secondary school and a public university under both the establishment and free speech clauses. A comparison of the facts of the present case with those in *Widmar* illustrates the errors in extending *Widmar* to the vastly different setting of a public school.

In *Widmar*, the Court emphasized that the student meetings conducted on the campus of a state university did not involve the government's official stamp of approval: "First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. While a public university may constitute a public forum, the campus of a public secondary school rarely if ever possesses these characteristics. *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. ___, 108 S. Ct. 562 (1988); *Perry Education Ass'n.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The University of Missouri had a policy of unrestricted access to campus facilities. 454 U.S. at 267. As this Court noted, that policy effectively disassociated the university from the message of any of the student groups which met on campus:

> [S]uch a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

[9]During Congressional hearings, Senator Hatfield stated: "This bill is a straightforward measure to apply the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) to public schools which receive federal aid." *Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983)(prepared statement of Senator Hatfield). *See* S. Rep. No. 357, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348, analyzed in *Stud. Coalition for Peace v. Lower Merion School*, 776 F.2d 431, 439. (3d Cir. 1985).

Id. at 274. Public secondary schools are considered to be public forums only if school officials have allowed them to become open to "indiscriminate use by the general public." *Hazelwood*, 108 S. Ct. at 569.

In contrast to the policy of the University of Missouri, which provided for indiscriminate access of student organizations, Westside's Policy 5610 excludes clubs which embrace discriminatory standards and those which are sponsored by any religious organization. J.A. 488. Further, Policy 5610 provides: "student clubs and organizations [are] *a vital part of the total education program* as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Id.* emphasis added. Pursuant to this policy, Westside has promoted various skills-training clubs such as chess and photography, service clubs, such as Interact and Zonta, and civic clubs, such as student government. The subject matter of these clubs reflects the special educational and civic goals of the public schools. *See Hazelwood*, 108 S. Ct. at 570. Since Westside clearly regulates the use of its facilities by students, the school does not constitute a public forum. *Id.* at 562.

Furthermore, the students in *Widmar* were not compelled by law to attend the University of Missouri. In contrast, attendance for high school students is mandated by state law. *Garnett*, 865 F.2d at 1125; *Bender*, 741 F.2d at 548. Obviously, the establishment clause prohibits government from transporting citizens to and from worship services at a government-owned and maintained facility at public expense. *See McCollum*, 333 U.S. at 209-210. The EAA, however, requires the public schools to provide exactly this support to students who wish to pray at Westside.

Westside also differs from a public university in that Policy 5610 requires the presence of a faculty sponsor at student meetings, thus placing the authority of government over student religious activities. The circuit courts have repeatedly noted the significance of this distinction. The Ninth Circuit

pointed out in *Garnett* that "the student groups allowed to meet in *Widmar*, . . . did not need supervision or monitoring by government employees. 865 F.2d at 1126. In *Bender*, the Third Circuit emphasized:

> [I]t is readily apparent that a school teacher or somebody associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity. . . . Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government endorsement was part of the Widmar activity program. . . .

741 F.2d at 552-553. *See Little Axe*, 766 F.2d at 1405; *Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1047; *Brandon*, 635 F.2d at 978.

Most important, as this Court pointed out in *Widmar*:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

454 U.S. at 275 n. 14. The distinction drawn in *Widmar* reflects this Court's emphasis on the impressionability of public school students. In his concurring opinion in *Abington*, Justice Brennan noted that the difference in student ages "warrants a difference in constitutional results." 374 U.S. at 253. More recently this Court said in *Edwards*:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and/or his or her family Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

482 U.S. at 584 (citations omitted).

The circuit courts also have consistently evidenced this concern. In *Lubbock*, the Fifth Circuit recognized that the "impressionability of secondary and primary age school children and the possibility that they would misapprehend the involvement of the [school]" in religious meetings rendered such activities unconstitutional. 669 F.2d at 1045. *See also Brandon*, 635 F.2d at 978 ("To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This inference is too dangerous to permit").

Widmar simply does not apply to the vastly different setting of a public high school. *See* Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of Neutrality*, 81 Nw.U.L. Rev. 168, 172 (1986). By attempting to extend Widmar beyond its facts, the EAA misstates the free speech principles underlying that decision, and contravenes the establishment clause by allowing sectarian student groups to use the public secondary schools to promote religion.

IV. The Court of Appeals Erred in Deferring to Congress' Fact-Finding on a Matter of Constitutional Law.

Without engaging in any independent judicial inquiry, the court below merely accepted Congress' extension of *Widmar* to the public schools. Ignoring the many distinctions between the limited government role in the public university in *Widmar* and the significant role of government at Westside, the court below focused solely on the differing age levels of the students, and summarily concluded, "Congress considered the difference in the maturity levels of secondary and university level students before passing the EAA. We accept Congress' factfinding." 867 F.2d at 1080.

By deferring to Congress' "fact-finding" and its interpretations of both the free speech and establishment clauses of the first amendment, the court of appeals departed from its responsibility to apply the principles of constitutional law developed by this Court. While deference to Congress may be appropriate in areas such as commercial regulation, *see United States* v. *Carolene Products*, 304 U.S. 144 n. 4 (1938),

this Court has rejected the proposition that the judiciary should accede to the legislature's interpretation of the Constitution: "To the extent that the government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Sable Communications of California, Inc.* v. *F.C.C.*, 109 S. Ct. 2829, 2838 (1989). *See also Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978), ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

A constitutional determination is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 465 U.S. at 694 (O'Connor. J., concurring). The inquiry is a highly fact-sensitive one which emphasizes the specific context of the challenged government involvement with religion. *Allegheny*, 109 S. Ct. at 3102, 3103. In establishment clause cases involving educational settings, this Court has long recognized the constitutional distinctions presented by the divergent contexts of a university and a public school. *Compare Tilton* v. *Richardson*, 403 U.S. 672 (1971) *with Grand Rapids*, 473 U.S. 373. The court below erred in accepting without any judicial analysis Congress' "findings" concerning the EAA and its application to the setting of a public school.

V. Westside is Not Compelled by the Free Speech Clause of the First Amendment To Sponsor the Christian Bible Club.

A. The Free Speech Clause Does Not Require the Public Schools to Sponsor Religious Expression

In an effort to buttress their statutory claim, respondents attempt to cast this case in free speech terms. Yet as respondents readily concede, school officials have expressly permitted them to meet at the school. J.A. 450; 428. School officials have never attempted to dictate either the form or substance of their meetings. Respondents' only complaint, therefore, is that their meetings have not received the official imprimatur of school sponsorship that other clubs receive. What is at

stake in this case is whether or not respondents have a constitutional right to become the Westside High School Christian Bible Club.

Nothing in the first amendment guarantees that right. To the contrary, the use of the school's name in connection with an inherently religious activity would raise obvious and profound establishment clause problems. *See* Section I, *supra*. These constitutional problems are not vitiated by the Eighth Circuit's erroneous application of *Widmar*'s public forum analysis to this case. None of the student clubs at the University of Missouri were school sponsored; accordingly, *Widmar* is entirely silent on the question of school sponsorship of student clubs, the issue now before this Court. *Widmar* holds that a state university cannot selectively deny access to student groups wishing to meet for purposes of religious expression. Westside has provided such access in this case. Whether Westside created "a limited open forum" by sponsoring certain student clubs pursuant to school board policy is inapposite.

B. Westside's Sponsorship of a Christian Club Would Constitute Government Speech and Would Promote a Religious Viewpoint

This Court has affirmed there is no first amendment right to incorporate religious doctrine in the public school curriculum. *Smith* v. *Board of School Com'rs*, 827 F.2d 684 (11th Cir. 1987), *aff'd*, ___ U.S. ___ (1988). In regard to other school activities, this Court has recognized the distinction between the constitutional protection of student free speech rights and "whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood*, 108 S.Ct. at 569.[10] If the Hazelwood School District has discretion over the contents of its school newspaper in order to avoid the impression of official school sponsorship, given the express prohibition on religious endorsement contained in the establishment clause, Westside cannot be constitutionally compelled to sponsor a student Christian club.

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[10] *See generally* Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863 (1979).

In eschewing sponsorship of religious clubs, Westside maintains a policy of religious neutrality, and not hostility toward religion.[11] There is no basis for respondents' allegations that the school has discriminated against their particular religious viewpoint. Neither Westside's curriculum nor any of its clubs express any viewpoint whatsoever on religion. *Cf. Tinker* v. *Des Moines*, 393 U.S. 503 (1969).

C. Non-Recognition of the Christian Club Does Not Infringe Student Free Speech Rights

1. Equal Endorsement v. Equal Access

Respondents do not seek "equal access" to school facilities. Instead, they seek "equal status" to become the Westside High School Christian Club. *See* J.A. at 157, 244, 454. They want Westside to express their private sectarian messages as the school's message. While neither students nor teachers check their first amendment rights at the school house door, neither do they there obtain the right to commandeer the state's imprimatur and resources in support of their personal sectarian views. *See, e.g., Mary May* v. *Vanderburgh*, 787 F.2d 1105 (7th Cir. 1986). Such government endorsement has no analogue in the larger community. Stewart, *The First Amendment, the Public Schools and the Inculcation of Community Values*, 18 Journal of Law and Education 23, 28 (1989). In fact, the establishment clause forbids such governmental support for religious messages. There is a constitutional difference between a private religious club and a school sanctioned one. *See, e.g., Perumal* v. *Saddlebrook*, 243 Cal. Rptr. 545 (Cal. App. 4 Dist.), *cert. denied*, 109 S.Ct. 327 (1988). Respondents would blur that distinction. Respondents want to compel Westside to express their personal religious viewpoints as the message of the public school.

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[11] To suggest otherwise is to overrule longstanding court precedent mandating separation of church and state in the public schools. *See, e.g., Wallace*, 472 U.S. at 60. The principle of separation of church and state does not constitute hostility toward religion. *See Abington*, 374 U.S. at 215. *See also Smith* v. *Board of Commissioners*, 827 F.2d 684 (11th Cir. 1987).

2. Respondents' Religious Expression

Furthermore, the students are not deprived of the means of religious expression. They are free to meet as a group for religious purposes at school, J.A. 428,450, and they meet several nights each week in their homes. They also worship in the neighboring Westside Community Church. J.A. 140-141. As Justice Brennan pointed out in his concurring opinion in *Abington*, "[t]he student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." 374 U.S. at 299. The constitutional barrier to the use of public school facilities to promote religious activity does not impair the students' ability to engage in prayer "outside of the school premises and at times other than during school hours." *Bender*, 741 F.2d at 560. Westside's policy in no way prevents respondents from practicing their religion.

3. The School Cannot Disclaim a Religious Endorsement

Finally, if Westside endorses a Christian club as a school club, as a constitutional matter, that endorsement cannot be disclaimed. In *Allegheny*, this Court recognized that such a disclaimer would simply demonstrate that, rather than communicating a message of its own, "the government is endorsing the religious message of that organization." 109 S. Ct. at 3105. "But the establishment clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communication by religious organizations." *Id.* If respondents succeed in establishing the Westside High School Christian Bible Club, they will have succeeded in compelling the school to endorse their religious views, without any free speech basis and contrary to the establishment clause.

D. School Religious Clubs Undermine the Public School's Ability to Foster Democratic Values of Equality and Tolerance.

To "prepar[e] . . . individuals for participation as citizens." our nation's public schools bear "the obligation to promote civic virtues." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). These "civic virtues" are those democratic principles which

enable us to coexist as citizens in a pluralistic society. *See Bethel* v. *Fraser*, 478 U.S. 679, 682 (1986); *Bd. of Educ.* v. *Pico*, 457 U.S. 853 (1982). *See generally* Yudof, *supra* note 10. To this end, the school's educational purpose is not value-free. Principles of racial and religious equality as well as religious tolerance are fundamental to our system. *See, e.g.*, The Declaration of Independence, Art. 1. This Court has emphasized repeatedly that it is the function of the public schools to promote these values. *See, e.g., Brown* v. *Bd. of Ed.*, 347 U.S. 483 (1954); *see Abington*, 374 U.S. 203.

There is no basis in either law or policy for respondents' claim to an "equal access" right to compel Westside to promote a particular religious message. *See Hazelwood*, 108 S. Ct. at 570; *Smith* v. *Bd. of Commissioners*, 827 F.2d 684. For example, nothing compels a school to sponsor an apartheid club in order to balance out the principles of nondiscrimination taught in the classroom. *See, e.g., Smith* v. *St. Tammany Parish Board*, 316 F. Supp. 1174 (E.D. La. 1970), *aff'd*, 448 F. 2d 414 (8th Cir. 1971).[12]

The public schools foster those values which allow students of different races and religions to study, work, and live together in harmony. In order to foster the habits of citizenship, it is essential to maintain separation of church and state in our public schools. Our nation's unparalleled religious diversity and freedom flourishes when personal religious choices are made free of pressure from governmental institutions.[13] Allowing a sectarian group to use the public school system to promote its beliefs and to proselytize interferes with an individual's freedom of conscience, and impedes the public schools' ability to promote "cohesion among a heterogeneous democratic people." *McCollum*, 333 U.S. at 216 (Frankfurter, J. concurring).

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[12]While the first amendment may protect the right of the Ku Klux Klan to meet at public schools when they are functioning as forums open to the community, *see, e.g., Knights of the KKK* v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), the EAA goes much further. Under the EAA, schools could be required to permit a student-initiated chapter of the Ku Klux Klan to meet on school premises during the school day. *See* 130 Cong. Rec. S.8340, 8343 (June 27, 1984).

[13]There are over 1200 religions and religious sects in this country. J. Melton, *A Directory of Religious Bodies in the United States*, xiii (1977).

CONCLUSION

In his concurring opinion in *Abington*, Justice Brennan declared:

> It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.

374 U.S. at 241-242 (emphasis in original). The EAA and its application in this case violate the establishment clause of the first amendment; by sanctioning sectarian religious activities in our nation's public schools, it interferes with the right of the individual to believe as he or she sees fit and it undermines the school's ability to instill in students the vital democratic values of respect and tolerance.

For the reasons stated herein, *amici* respectfully urge that the decision of the court of appeals be reversed.

Respectfully submitted,

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APPENDIX A

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Conn. Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation;
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation

Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmira CRC of Jewish Welfare Fund
Greater Kingston Jewish Federation
New York JCRC
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC

Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

APPENDIX B

MEMBER ORGANIZATIONS OF THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY JOINING IN THIS BRIEFS

American Association of School Administrators
The National Education Association
National P.T.A.
The Committee for Public Education and Religious Liberty
Americans for Religious Liberty
The American Civil Liberties Union
The Minnesota Civil Liberties Union
The American Ethical Union
The National Service Conference of the American Ethical Union
American Hum. Association
Council for Democratic and Secular Humanism
Ohio Association for Education and Religious Lib.
Michigan Council Against Parochaid
Public Funds for Public Schools of New Jersey
Munroe County PEARL
Central Conference of American Rabbis